IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RODRIGUEZ, JOSE E., Appellant.	)	No. 62018-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 8, 2009

Appelwick, J. —Rodriguez appeals his burglary sentence, arguing that the State failed to prove that the out-of-state, California, convictions for residential burglary were comparable to Washington offenses. Because the record does not establish that unlawful entry was proved beyond a reasonable doubt or admitted or stipulated to by Rodriguez, we conclude that the court's decision to include the two California burglary convictions in his offender score was error. We remand for resentencing consistent with this opinion.

FACTS

In 1996, a jury convicted Jose Rodriguez of one count of residential

burglary, in violation of RCW 9A.52.025. At sentencing, the prosecutor claimed Rodriguez had an offender score of 8, based on his recent Washington convictions and two California convictions for first degree burglary. State v. Rodriguez, noted at 130 Wn. App. 1044, 2005 WL 3360885, at *2 (2005), adhered to on remand, 158 Wn.2d 1006, 143 P.3d 596 (2006). Neither the prosecutor nor the court performed a comparability analysis to prove that the California convictions were comparable to Washington crimes. Id. Rodriguez's attorney agreed with the State's standard range, but Rodriguez himself argued that his recent convictions should be set aside and the standard range for this conviction should be 22 to 29 months. Id. Neither Rodriguez nor his attorney affirmatively acknowledged or challenged the comparability of the California convictions. Id. The court accepted the State's offender score calculation and sentenced Rodriguez to 53 months of confinement. Rodriguez appealed his conviction and sentence.

On appeal, in Rodriguez, 2005 WL 3360885, at *4, we remanded in order for the sentencing court to determine if the California convictions could be included in Rodriguez's offender score calculation. This court mandated the case to the superior court for resentencing in January 2008.

At the sentencing on remand, the State offered several documents to establish the comparability of the California convictions: the abstract judgment-prison commitment form, the information, the felony complaint for arrest warrant, colloquy of Rodriguez's guilty pleas dated April 2, 1992, and the transcript of a

preliminary hearing dated January 24, 1992. The information alleged that:

> On or about June 10, 1991, in the County of Los Angeles, the crime of first degree residential burglary, in violation of Penal Code Section 459, a felony, was committed by Julio Bento,[1] who did willfully and unlawfully enter an inhabited dwelling house and trailer coach and inhabited portion of a building occupied . . . with the intent to commit larceny and any felony.

(Capitalization omitted). The felony complaint for arrest warrant contained identical information. The abstract of judgment-prison commitment form from the Los Angeles Superior Court listed that in 1991, Rodriguez was convicted of first degree burglary. In the colloquy of the guilty plea, Rodriguez pleaded guilty to charges that "on June 10 of 1991 . . . [he] willfully and unlawfully enter[ed] an inhabited dwelling house . . . to commit larceny . . . ." (Capitalization omitted). Last, the State submitted a transcript from a preliminary hearing regarding Rodriguez's charges, where a witness testified that she returned to her apartment on June 10, 1991, to discover $6,000 worth of items missing. She testified that she had not given Rodriguez permission to enter.

The sentencing court determined that Rodriguez's two convictions in California for first degree burglary were comparable to Washington's second degree burglary. Subsequently, the court ordered Rodriguez to pay a $500 victim assessment, and sentenced him to 53 months of confinement. He appeals.

DISCUSSION

Rodriguez contends that the sentencing court erroneously included two

[1] The court found that the person convicted in California was the defendant, despite the name difference.

California convictions for burglary.[2] He argues that, because both of the California offenses are broader than comparable Washington offenses and because the record does not include documentation of factual comparability the State failed to satisfy its burden of proving that the foreign convictions were comparable.

"Where a defendant's criminal history includes out-of-state convictions, the [Sentencing Reform Act] requires these convictions be classified 'according to the comparable offense definitions and sentences provided by Washington law.'" State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (quoting State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994)). The elements of the out-of-state crime must be compared to the elements of a comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). To determine if the foreign conviction is comparable, the court must first compare the elements of the foreign crime to the elements of the Washington crime. Id. at 605-06. If an out-of-state statute prohibits a broader range of conduct than the proposed Washington counterpart—i.e., the elements of the out-of-state offense are not legally comparable—the State must prove that the offenses are factually comparable. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved

[2] Rodriguez seeks review of the comparability determination by the court, but additionally argues that he was denied effective assistance of counsel, because at sentencing his lawyer stated that the California convictions were "arguably" comparable to a Washington offense. Because we resolve the issue on the central issue of comparability, we do not address this claim.

beyond a reasonable doubt. Id. at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); State v. Ortega, 120 Wn. App. 165, 171-74, 84 P.3d 935 (2004), vacated on other grounds, 131 Wn. App. 591, 128 P.3d 146 (2006), review denied, 160 Wn.2d 1002, 158 P.3d 614 (2007).

In Rodriguez, we determined that "[i]t is undisputed that Rodriguez was convicted under a California burglary statute that is broader than the Washington statute." 2005 WL 3360885, at *3. Specifically, Rodriguez's California burglary convictions were based on violations of California Penal Code § 459 (CPC), which states, in relevant part:

> Every person who enters any house, room, apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

In State v. Thomas, we held regarding CPC § 459 that:

> Unlike Washington's burglary statute, the California crime of burglary encompasses a broader range of property and does not require proof that the defendant entered or remained unlawfully. California's law only requires the defendant enter with intent to commit larceny or any felony.

135 Wn. App. 474, 478, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007). The State concedes that burglary under California law has broader elements than under Washington law.

Therefore, the only question before us is whether the State established factual comparability of the California offenses when RCW 9A.52.010(3) defines

unlawful entering as entering "when he is not then licensed, invited, or otherwise privileged to so enter."

The State failed to meet its burden of proof. Neither the plea colloquy, judgment, nor information establish the facts sufficient for a conviction under Washington law: no facts admitted, stipulated to, or found beyond a reasonable doubt prove that Rodriguez's entry met the definitional requirements of RCW 9A.52.010(3).

But, the State argues that the testimony at a preliminary hearing established the fact that Rodriguez entered unlawfully. The State suggests that the guilty plea necessarily incorporated the preliminary hearing, because the California court accepted the plea, noting "there is a factual basis, having read from the transcript of the preliminary hearing that was held January 24, 1992 . . ." (Capitalization omitted). The State cites no authority for the proposition that California law incorporates the facts, as testified to in a preliminary hearing, when a person pleads guilty.

Rodriguez argues that testimony from a preliminary hearing cannot be relied upon to establish factual comparability. Indeed, in making its factual comparison for comparability, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. No Washington authority supports the State's argument that a preliminary hearing transcript meets this standard when Rodriguez did not admit to those facts.

Because no facts admitted, stipulated to, or proved beyond a reasonable doubt establish that Rodriguez entered unlawfully, as defined by RCW 9A.52.010(3); we hold that the State failed to prove the California burglary convictions are comparable to Washington offenses. We remand for resentencing.

Appelwick, J.

WE CONCUR:

Schindler, C.J. Cox, J.